



Kansas Attorney General Derek Schmidt

A GUIDE TO OPEN MEETINGS (KOMA) AND OPEN RECORDS (KORA)

Cheryl Whelan
Assistant Attorney General
LOGIC Division



Kansas Open Meetings Act

K.S.A. 75-4317 *et seq.*



History of open meetings

- K.S.A. 19-218 – Every board of county commissioners “shall sit with open doors, and all persons conducting in an orderly manner may attend their meetings. . . .”
- First adopted in 1868; last amended in 1923
- KOMA adopted in 1972; provides rules that allow members of the public to observe the nearly 4,000 units of government in Kansas making decisions



Policy and construction

- K.S.A. 2014 Supp. 75-4317(a) - Meetings shall be open to the public because “a representative government is dependent upon an informed electorate. . . .”
- Law enacted for the “public benefit,” so construed broadly in favor of the public to give effect to its specific purpose of openness. *State ex rel. Murray v. Palmgren*, 231 Kan. 524, Syl. ¶ 4 (1982)
- KOMA interpreted liberally and exceptions applied narrowly to carry out purpose



Who is subject to KOMA?

- All legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, and other subordinate groups thereof receiving or expending and supported in whole or in part by public funds K.S.A. 2014 Supp. 75-4318
- “Subordinate groups” – not defined; if created by a covered entity or the group has become an extension of a covered entity, most likely covered



Who is not subject to KOMA?

- An otherwise covered entity when exercising a “quasi-judicial” function - K.S.A. 2014 Supp. 75-4318(g)(1)
- Hearings conducted under the Kansas Administrative Procedures Act (KAPA) K.S.A. 2014 Supp. 77-523(f); K.S.A. 2014 Supp. 75-4318(g)
- Judiciary
- Private organizations
- Staff meetings of a covered entity



What is a meeting?

- Any gathering or assembly in person, through the use of a telephone, or any other medium for interactive communication
- By a majority of the membership of an agency or public body subject to the act
- For the purpose of discussing the business or affairs of the public body or agency

K.S.A. 2014 Supp. 75-4317a



Gathering or assembly

- May conduct meetings by telephone or other medium (video, skype, third parties) if comply with all KOMA requirements
- Informal discussions before, after or during a recess of a public meeting are subject to KOMA
- Name of the gathering is irrelevant



“Serial communications”

Interactive communications outside of a noticed meeting may be a meeting under KOMA if:

- Collectively involve a **majority of the membership** of the public body
- Share a **common topic** of discussion
- Are **intended** by any or all participants **to reach an agreement on a matter that requires binding action** to be taken by the public body or agency

K.S.A. 2014 Supp. 75-4318(f)

- **Practice tip:** If communicating with Commission or Council by email, place a notice at the beginning of the email – **“DO NOT REPLY ALL, DO NOT FORWARD”**



Majority of the membership

- Next whole number greater than one-half the total number of members
- Can be different than a quorum



Discussion

- Binding action or voting not necessary
- Meeting includes all gatherings at all stages of the decision making process
- Social gatherings
- Retreats and meetings held in private
- Educational conference/seminar
- **Practice tip** – when traveling to such meetings, advise members of public body to avoid discussing business or affairs



Notice

- Contrary to popular belief, KOMA does not require notice of meetings to be published in a paper or on a website
- Individual must request notice of meetings
- No formalities to requesting notice – can be verbal or written
- Provide date/time/location where body will meet to person requesting notice a “reasonable time” before meeting
- A request is valid for one fiscal year
- Must notify of expiration before terminating notice
- Presiding officer has duty to provide notice, but duty may be delegated

K.S.A. 2014 Supp. 75-4318(b)



Meeting conduct

- KOMA does not address meeting procedures
- Agenda – not required to create, but if one exists, make it available to everyone
- Agenda does not have to be mailed out in advance of meeting
- Public may record meeting as long as not disruptive
- No public right to speak, but only to listen and observe
- No secret ballots
- Minutes – only required to record motion to go into executive session, but bylaws, ordinances, policies, etc., may require minutes to be kept



Executive sessions

- Permits discussion of certain enumerated matters outside of public view
- An open meeting must be convened first
- No binding actions may be taken in an executive session, but a consensus is allowed
- If a consensus is achieved, an open and formal vote must be taken in open session



Executive sessions

- Must be a formal motion seconded and carried; motion recorded in the minutes
- Parts of the motion for executive session:
 - ✓ Justification for closure (brief description of topic to be discussed)
 - ✓ Subject matter (from the statute)
 - ✓ Time/place open meeting will resume

K.S.A. 2014 Supp. 75-4319



Executive sessions

Commonly used subject matters:

- Personnel matters of non-elected personnel
- Consultation with the body's attorney
- Employer - Employee negotiations
- Confidential data relating to the financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorship (economic development)
- Matters affecting a student, patient or resident of a public institution
- Preliminary discussions relating to the acquisition of real property
- Security measures

K.S.A. 2014 Supp. 75-4319



Executive sessions

Subject matter allowed:

Personnel matters of non-elected personnel

- To protect the privacy interests of the employee
- Non-elected employees only, not contractors or appointments to boards or commissions
- May discuss applicants for employment

K.S.A. 2014 Supp. 4319(b)(1)



Executive sessions

Subject matter allowed:

Consultation with the body's attorney

- The attorney must be present
- The communication must be privileged
- No third parties may be present (breaks privilege)

K.S.A. 2014 Supp. 75-4319(b)(2)



Executive sessions

Subject matter allowed:

Employer-Employee negotiations

- For the purpose of formal negotiations – not general employee meetings or discussions
- School boards have special rules

K.S.A. 2014 Supp. 75-4319(b)(3)



Executive sessions

Subject matter allowed:

Confidential data relating to the financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorship

- Called the economic development exception, but make sure that the data being reviewed is confidential or a trade secret

K.S.A. 2014 Supp. 75-4319(b)(4)



Executive sessions

Subject matter allowed:

Matters affecting a student, patient or resident of a public institution.

- With this subject, any hearing must be open if requested by the person involved

K.S.A. 2014 Supp. 75-4319(b)(5)



Executive sessions

Subject matter allowed:

Preliminary discussions relating to the acquisition of real property

- Acquisition only – not sale
- Remember – no binding action in executive sessions

K.S.A. 2014 Supp. 75-4319(b)(6)



Executive sessions

Subject matter allowed:

Security Measures

- Open discussion would jeopardize security measures that protect infrastructure and the public; includes intelligence information, tactical plans, resource deployment and vulnerability assessments

K.S.A. 2014 Supp. 75-4319(b)(13)



Enforcement

- KOMA is a civil statute – not criminal
- Any person, county/district attorney or the attorney general may bring an action in district court
- County/district attorney and attorney general have subpoena power
- Enforcement actions “shall take precedence over all other cases and shall be assigned for hearing and trial at the earliest practicable date”



Remedies for violations

- Voiding action taken (attorney general or county/district attorney only)
- Injunction (stopping action)
- Mandamus (forcing action)
- Declaratory judgment



Penalties for violations

- Fines up to \$500 per person for each violation
 - Can be grounds for ouster from office
 - Potential grounds for recall from office
 - Court may award court costs to person seeking enforcement of KOMA; award assessed against public body
 - Court may award court costs to defendant if plaintiff maintained action frivolously, not in good faith or without reasonable basis in law or fact
- K.S.A. 2014 Supp.75-4320; K.S.A. 75-4320a



Legislative changes – consent judgment

- AG, *County or District Attorney* may accept a **consent judgment** in lieu of action per K.S.A. 75-4320a
- Consent judgment may contain any remedy available to district court but shall not include an award of reasonable expenses, investigation costs or attorney fees
- District court must approve consent judgment and enter judgment
- Breach of consent judgment is violation of court order and subject to penalties provided by law

L. 2015, Ch. 68 § 5; K.S.A. 75-4320f



Legislative changes – AG authority

- If determine by preponderance of the evidence after an investigation that a violation of KOMA occurred, AG may:
 - Enter into **consent order (CO)**
 - Issue a **finding of violation (FOV)**
 - Seek district court enforcement of CO or FOV

L. 2015, Ch. 68 § 4; K.S.A. 75-4320d



Legislative changes – consent order

- AG may investigate - preponderance of evidence standard
- Anytime prior to filing an action under K.S.A. 75-4320a, AG may enter into **consent order** that may:
 - Contain **admissions of fact**
 - Require completion of AG approved training
 - Impose civil penalty up to **\$250** for each violation
 - Set forth agreement to comply with the KOMA
 - Require submission of proof CO requirements met
- CO shall bear **signature** of head of public body or agency, of officer found to have violated the KOMA, and of any other person required by the AG

L. 2015, Ch. 68 § 4; K.S.A. 75-4320d



Legislative changes–finding of violation

- AG may investigate - preponderance of evidence standard
- AG issues FOV to public agency or body
- FOV may contain **findings of fact** and **conclusions of law**
- FOV may require the public agency or body to do any or all of the following:
 - Cease and desist from further violation
 - Comply with the KOMA
 - Complete AG approved training
 - Pay civil penalty up to **\$500** for each violation
 - Submit proof of compliance with the FOV

L. 2015, Ch. 68 § 4(a)(2); K.S.A. 75-4320d



CO/FOV Enforcement – district court

- AG may apply to district court to enforce CO or FOV
 - AG shall make demand of public body or agency to comply with CO or FOV, and provide **reasonable opportunity to cure** the violation
 - Venue – county where CO or FOV issued or effective
 - District court – if AG did not abuse discretion then court shall:
 - Enjoin the public body or agency to comply with CO or FOV
 - Impose civil penalty not less than AG imposed and not more than **\$500** per violation
 - Require public body or agency to pay AG's court costs and investigative costs
 - Impose other remedy authorized by K.S.A. 75-4320a(4)
- L. 2015, Ch. 68 § 4(c)(1), (2) and (3); K.S.A. 75-4320d



CO/FOV Enforcement – district court

- If court finds the KOMA was violated, the District court **may** require the public body or agency to pay AG's reasonable attorney fees
 - If the court finds the KOMA was violated **and** the violation was not made in good faith and without a reasonable basis in fact or law, the District court **shall** require the public body or agency to pay the AG's reasonable attorney fees
- L. 2015, Ch. 68 § 4(c)(4); K.S.A. 75-4320d



Issues/concerns raised by public

- Executive sessions
- Improper motions for executive sessions
- Calling an executive session for one reason/subject, then discussing different subject matter in session
- Inclusion of non-Commission/Council members in executive sessions
- Extending an executive session without reconvening the open meeting, making a motion and voting
- Failure to return to open meeting at the stated time/place after executive session
- Revealing information discussed in executive session
- Serial communications
- Majority of membership of body gathered together without notice
- Failure to provide notice of meetings



Kansas Open Records Act

K.S.A. 45-215 *et seq.*



Policy, construction, purpose

- "Public records shall be open for inspection by any person unless otherwise provided, and this act shall be liberally construed and applied to promote such policy" – K.S.A. 45-216(a)
- KORA enacted in 1984; it replaced version enacted in 1957
- KORA provides the procedure for the public to view and make copies of governmental records
- KORA also defines and categorizes records



What is a "public agency?"

- Includes the state or any political or taxing subdivision of the state, or any office, officer, agency or instrumentality thereof, or any other entity receiving or expending or supported in whole or in part by public funds appropriated by the state or political/taxing subdivision
- Instrumentality – not defined in KORA; if created by a covered entity or the group has become an extension of a covered entity, most likely covered



What is not a “public agency?”

- Private companies, even if they receive public funds in exchange for goods and services
- Judges and courts
- An individual legislator or member of a governing body
- Private individuals
- State employees



Applying KORA to a request

- KORA is, in part, a procedural statute
- Best illustrated by reviewing the sequence of actions that should take place



KORA requirements for public agencies

- Appoint a FOI officer to assist with KORA requests
- Display, distribute or otherwise make available a brochure describing requester rights, agency responsibilities and procedures for inspecting or obtaining copies of public records
- Include the name/title of records custodian, fees and office hours available for anyone to make a request

K.S.A. 45-226 and K.S.A. 45-227



Who may make a request?

- Any person may make a request
- The person need not be a resident
 - *But see McBurney v. Young*, US Sup. Ct., April 2013 (Not a violation of privileges and immunities clause to limit access to public records to citizens of Commonwealth of Virginia)
- The person need not provide a reason for their request



Form of the request

The public agency may require:

- The request to be in writing
- Only the requester's name and address
- Proof of identification
- Written certification that the requester will not use names and addresses obtained from the records to solicit sales or services



Rights of the requester

- Unless closed by law, the public has the right to review all public records
- Any person may make abstracts or request copies of records
- If copies cannot be made where the record is located, arrangements must be made to allow copying
- If portions of a record are closed, the remainder must be made available to the requester



Limitations on requester's rights

- Requester may not remove a public record without the written consent of the custodian
- Public agency not required to make copies of radio or recording tapes or discs, video tapes or films, pictures, slides, graphics, illustrations unless shown at a public meeting
- Copyrighted materials may not be reproduced without the permission from the copyright holder, but must be available for viewing or listening.



Responding to the request

- The request must be "acted upon" as soon as possible, but not later than the end of the 3rd business day following date request is received
- The three acceptable responses:
 1. The record is provided (in the form requested, if possible)
 2. The request is under review and the records, if permitted, will follow
 3. The request is denied, with a detailed explanation for the denial



Allowable fees and charges

- Agency may only recover actual costs to provide the requested records
- These costs include staff time to retrieve, review and redact information from a record
- Fees may be estimated and collected before the records are provided

K.S.A. 45-218(f) and K.S.A. 2014 Supp. 45-219



Public record defined

- Any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency
- Includes written records, photographs, computer data, and email
- Does not include records which are owned by a private person or entity and are not related to functions, activities, programs or operations funded by public funds
- Does not include records not in existence at time of request
- Do not need to create records in order to fulfill a request
K.S.A. 2014 Supp. 45-217



Categorizing records

- Presumption of openness
- Requested public records must be released unless an exemption to disclosure applies
- Burden rests on public agency to prove the requested records are exempt from disclosure
- Exemptions to disclosure – discretionary or mandatory closure
- Redaction – if record contains material not subject to disclosure, public agency "shall separate or delete such material" and make the record available



Policy reasons records may be closed

- Personal privacy
- Safety/security
- Internal communications while policies are developed or administrative procedures are underway



Discretionary closure – personal privacy

- Medical, psychiatric, psychological or alcoholism/drug dependency treatment records pertaining to identifiable patients
- Personnel records, performance ratings or individually identifiable records pertaining to employees or applicants
EXCEPT exemption shall not apply to:
 - Names of employees
 - Positions/Titles
 - Salaries or actual employment contracts, including employment related contracts or agreements
 - Length of service
- Clearly unwarranted invasion of personal privacy



Discretionary closure – personal privacy

- Records that would disclose the name, home address, email address, phone/cell number, or other contact information for concealed carry licensees, applicants or persons enrolled in or who completed weapons training – K.S.A. 2014 Supp. 45-221(a)(53)
- Records "shall not be disclosed unless otherwise required by law"
- Records relating to persons issued licenses, applicants or persons denied a license shall be confidential and cannot be disclosed pursuant to KORA; disclosure a class A misdemeanor – K.S.A. 2014 Supp. 75-7c06(b)
- Records of person whose license suspended or revoked subject to public inspection under KORA – K.S.A. 2014 Supp. 75-7c06(c)



Discretionary closure – safety/security

- Criminal investigation records – K.S.A. 2014 Supp. 45-221(a)(10)
 - Protects innocent persons whose names might be involved in an investigation as suspects or informants
 - Protects integrity of an on-going case and investigative techniques
 - Built in standard of review
- Records concerning emergency or security information or procedures
- Records that would reveal the location of a safe house or shelter for abused persons or the name, address, location or other contact information of alleged victims of stalking, domestic violence or sexual assault



Discretionary closure – safety/security

- Records of a public agency on a public website which are searchable by a keyword search and that identify the home address or home ownership of a federal judge, supreme court justice, court of appeals judge, district judge, magistrate judge, **municipal judge**, US attorney for Kansas, assistant US Attorney, **special assistant US attorney**, AG, assistant AG, **special assistant AG**, county/district attorney, assistant CA/DA, **special assistant CA/DA**, **city attorney**, **assistant city attorney** or **special assistant city attorney**
- Individual shall file a request to restrict identifying information from public access on the public website with the custodian of records; must be restricted within 10 business days of receipt of request; restriction expires after 5 years; individual may file new request for restriction at any time

L. 2015, Ch. 68 § 10; K.S.A. 2014 Supp. 45-221(a)(52)



Discretionary closure – internal communications or procedures

- Records privileged under rules of evidence, unless consent
- Records of an investigation conducted under civil litigation or administrative adjudication, if disclosure interferes with the procedure
- Correspondence between a public agency and a private individual, unless intended to give notice of an agency action, policy or determination
- Notes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records in which opinions are expressed or policies or actions are proposed **except** where such records are publicly cited/identified in an open meeting or in an agenda of an open meeting



Discretionary closure – internal communications or procedures

- Attorney work product
- Appraisals/engineering/feasibility estimates/evaluations by or for a public agency relating to acquisition or disposal of property, prior to the award of formal contracts
- Specifications for competitive bidding, until officially approved by the public agency
- Sealed bids and related documents until a bid is accepted or all bids rejected



Mandatory closure of records

- There are nearly 300 types of records that are required to be closed by statute and not listed in KORA
- KORA will look to other statutes first
- Records custodian must be familiar with those records and what must be separated into the open and closed portions of a record



Enforcement

- KORA is a civil statute – not criminal
- Any person, county/district attorney, or the attorney general may bring an action in the district court where the records are located
- County/district attorney and attorney general have subpoena power
- Such actions “shall be assigned for hearing and trial at the earliest practicable date” – K.S.A. 45-222(e)
- Court may review records *in camera*



Penalties for violations

- Fines up to \$500 per violation against public agency for knowing violation or intentional failure to furnish information; action must be brought by county/district attorney or attorney general
- Costs/reasonable attorney's fees if agency's denial not in good faith and without reasonable basis in fact/law; includes appeals
- Costs/reasonable attorney's fees to agency if requester's action not in good faith and without reasonable basis in fact/law; includes appeals

K.S.A. 45-222 and 45-223



Legislative changes – consent judgment

- AG, County or District Attorney
- May accept a **consent judgment** in lieu of action per K.S.A. 45-222
- Consent judgment may contain any remedy available to district court but shall not include an award of reasonable expenses, investigation costs or attorney fees
- District court must approve consent judgment and enter judgment
- Breach of consent judgment is violation of court order and subject to penalties provided by law

L. 2015, Ch. 68 § 2; K.S.A. 45-253



Legislative changes – AG authority

- If determine by a preponderance of the evidence after an investigation that a violation of KORA occurred, AG may:
 - Enter into **consent order** (CO)
 - Issue a **finding of violation** (FOV)
 - Seek district court enforcement of CO or FOV

L. 2015, Ch. 68 § 1; K.S.A. 45-251



Legislative changes–consent order

- AG may investigate – preponderance of evidence standard
- Anytime prior to filing action per K.S.A. 45-222, AG may enter into a **consent order** that may:
 - Contain **admissions** of fact
 - Require completion of AG approved training
 - Impose civil penalty up to **\$250** for each violation
 - Set forth agreement to comply with the KORA
 - Require submission of proof CO requirements met

L. 2015, Ch. 68 § 1(a)(1)(A); K.S.A. 45-251



Legislative changes—consent order

- Public agency that is not a governing body – CO shall bear signature of head of public agency, any officer found to have violated the KORA, and of any other person required by the AG
- Public agency that is a **governing body** – CO shall bear **signature of all members**

L. 2015, Ch. 68 § 1(a)(1)(B); K.S.A. 45-251



Legislative changes—finding of violation

- AG may investigate – preponderance of evidence standard
- AG issues FOV to public agency
- FOV may contain **findings of fact and conclusions of law**
- FOV may require the public agency to do any or all of the following:
 - Cease and desist from further violation
 - Comply with the KORA
 - Complete AG approved training
 - Pay civil penalty up to **\$500** for each violation
 - Submit proof of compliance with the FOV

L. 2015, Ch. 68 § 1(a)(2); K.S.A. 45-251



CO/FOV Enforcement – district court

- AG may apply to district court to enforce CO or FOV
- AG shall make demand of public agency to comply with CO or FOV, and provide **reasonable opportunity to cure** the violation
- Venue – county where CO or FOV issued or effective
- District court may view records *in camera*
- District court – if AG did not abuse discretion then court shall:
 - Enjoin the public agency to comply with CO or FOV
 - Impose civil penalty not less than AG imposed and not more than \$500 per violation
 - Require public agency pay AG's court costs and investigative costs
 - Impose other remedy authorized by K.S.A. 45-222(a)

L. 2015, Ch. 68 § 1(c)(1), (2), and (3); K.S.A. 45-251



CO/FOV Enforcement – district court

- If court finds the KORA was violated, the District court **may** require the public agency to pay AG's reasonable attorney fees
- If the court finds the KORA was violated **and** the violation was not made in good faith and without a reasonable basis in fact or law, the District court **shall** require the public agency to pay the AG's reasonable attorney fees

L. 2015, Ch. 68 § 1(c)(5); K.S.A. 45-251



HB 2256 – additional provisions

- Complaint form submitted to AG
 - Form prescribed by AG
 - Attest to facts under penalty of perjury
- Training
 - Provide and coordinate training across the state based on availability of appropriations
 - May establish program of computerized training
 - May approve training programs
- Authority to adopt rules and regulations



Issues/concerns raised by public

- Calculation and explanation of the "reasonable" fee/actual costs
- Records provided did not meet requester's expectations
- Requester believes there should be existing public records, but none are found
- Is agency/entity covered by KORA, and if not, why not?
- Failure to respond within 3 business days
- Failure to provide the requested records
- Access to criminal investigation records



Non KORA Closure of Records



Search and arrest warrants

- Before 2014 change – closed to the general public
- Affidavits and sworn testimony given to obtain warrant were closed without a written court order, except as to the defendant or defendant's counsel – K.S.A. 22-2302(2) (arrests); K.S.A. 22-2502(c) (searches)
- Unexecuted arrest and search warrants – K.S.A. 2014 Supp. 21-5906 (disclosure is a class B non-person misdemeanor)
- LEO can disclose arrest or search warrant: (1) to gain assistance in executing warrant; (2) to encourage the person named in the warrant to voluntarily surrender; or (3) where warrant is issued in a case involving the abduction of a child unless such disclosure is specifically prohibited by court issuing the warrant



Search and arrest warrants

Accessing warrants *executed on or after July 1, 2014*

- Must file request with *Clerk of the Court*
- Clerk must "promptly notify" defendant or defendant's counsel, the prosecutor, and the magistrate that such request was filed
- Within 5 business days after receiving notice from clerk, defendant or counsel and prosecutor may submit to magistrate under seal (a) any proposed redactions and reasons supporting redactions; or (b) a motion to seal the affidavits or sworn testimony
- Within 5 business days after receiving proposed redactions or a motion to seal, or within 10 business days after receiving notice of a request for disclosure, whichever is earlier, magistrate shall:
 - Order disclosure of affidavit(s) / sworn testimony with appropriate redactions, if any, or
 - Order affidavit(s) / sworn testimony sealed and not subject to public disclosure



Search and arrest warrants

Grounds for magistrate to redact or seals affidavit(s) or sworn testimony

- Jeopardize safety / well being of victim, witness, confidential source or undercover agent or cause destruction of evidence
- Reveal information from wiretap or unexpired warrant to tracking device
- Interfere with any prospective law enforcement action, criminal investigation or prosecution
- Reveal identity of any confidential source or undercover agent
- Reveal confidential investigative techniques or procedures not known to general public
- Endanger life / physical safety of any person
- Reveal identifying information of victim of any sexual offense
- Reveal name of minor
- Reveal DOB, phone numbers, DL#, ID#, SSN, EIN, taxpayer ID #, VIN or financial account information



Questions?



Thank you!

Additional resources:

<http://ag.ks.gov/>

<http://ag.ks.gov/legal-services/open-govt>

<http://ksag.washburnlaw.edu/>

(Attorney General Opinions)